

# CJEU Opinion 2/13 – Three Mitigating Circumstances

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The EU as a Member of the ECHR CJEU Opinion 2/13 – Three Mitigating Circumstances Martin Scheinin Fr 26 Dez 2014

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The academic response to CJEU Opinion 2/13 on EU accession to the European Convention on Human Rights can be characterised as a combination of shock, disbelief and protest. Let me just refer to the critical blog posts by [Sionaidh Douglas-Scott](#), [Leonard Besselink](#), [Steve Peers](#) and [Walther Michl](#). Indeed, the Opinion looks like total *overkill*, as the grounds for rejecting the draft accession agreement are so many and so diverse that they unavoidably give the impression of being primarily based on a defensive and territorial attitude of protecting the exclusive and superior nature of the CJEU's own jurisdiction. One who reads the Opinion in full cannot honestly make the assessment that it would be based on the premise of seeking to improve the overall institutional framework for human rights protection. As commentators above have pointed out, a human-rights-based legal assessment of the Opinion is unavoidably negative.



That said, the critical discussion on Opinion 2/13 should include a search for *rational explanations* as to why the CJEU's opinion is negative, even if in the extreme. What follows is a short reflection on three factors towards that kind of an approach, without any intention to defend the Opinion itself.

(1) The time may not be right for EU accession to the ECHR. If one looks at Opinion 2/13 as a purely *political* move (by a very particular judicial actor known for its history of also being political), it may prove in time to have been a wise political move. The eurocrisis, the rise of eurosceptics in the 2014 elections of the European Parliament, the unpredictability of the capacity of the Juncker Commission to deliver, and the precarious political situation in some Member States, notably the United Kingdom and France, may justify a view that a judicially whistled timeout in the accession process is not necessarily a bad thing, compared to a bitter and perhaps destructive political process that might have followed a positive CJEU opinion. Under the Treaties, it will remain a legal obligation that the EU shall accede to the ECHR. Sooner or later the issue will need to be revisited, either through renegotiating the terms of the accession or through amending the Treaties to bypass the objections by the CJEU. The referee has declared a timeout until there is sufficient positive political will.

(2) Among the CJEU's multiple objections to the draft accession agreement the one that actually appeals to me is the court's reference to ECHR Protocol No. 16. True, the EU would not accede to that Protocol that will allow for Member States to seek advisory opinions from the ECtHR in matters concerning the interpretation of the ECHR. But the introduction by Council of Europe Member States of a new parallel 'preliminary ruling' procedure before

the ECtHR in issues that are *also* substantive EU law issues, coming just after a complicated accession agreement has been carefully drafted and negotiated with the EU is a sign of profound disloyalty towards the EU. 'Profound' particularly because of the active role of some EU Member States in introducing nation-state-serving amendments to the ECHR – not only Protocol No. 16 but also Protocol No. 15 – just after the closing of the draft association agreement in 2013. Because of that disloyalty the ECHR is now a moving target, a piece of slippery soap. If one wishes to read some human rights commitment into Opinion 2/13, it would be a signal that if the UK government is capable of pulling other Council of Europe Member States into a process of downgrading the ECHR, EU law and the CJEU are not willing to follow.

(3) Notably, Judge Allan Rosas is not listed in the composition of the CJEU in Opinion 2/13. Rosas who is known as one of the most human-rights-minded of CJEU judges did participate in the oral hearing of May 2014. When reporting of the hearing at that time, Stian Oby Johansen suggested that the questions by Rosas had been an exception and otherwise the hearing gave rise to a speculation that the CJEU would find the draft accession agreement incompatible with the Treaties. I do not know whether it was his role in the Legal Service of the Commission at the time of Opinion 2/94 that ultimately made Judge Rosas recuse himself in Opinion 2/13. In any case, one could take the absence of his name in Opinion 2/13 as a sign of disagreement within the CJEU and perhaps also of a prospect of a more balanced approach should the time become ripe for revisiting the issue.

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SUGGESTED CITATION Scheinin, Martin: *CJEU Opinion 2/13 – Three Mitigating Circumstances*, *VerfBlog*, 2014/12/26, <https://verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances-2/>.